



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tapex American Corporation
File: B-224206
Date: January 16, 1987

DIGEST

1. Where a protest has been filed initially with the contracting agency, subsequent protest to General Accounting Office is timely if filed within 10 working days of actual or constructive knowledge of initial adverse agency action.
2. While contracting agency has broad discretion to cancel an invitation for bids, there must be a compelling reason to do so after bid opening because of potential adverse impact on the competitive bidding system of cancellation after exposure of bid prices. Mere fact that the agency mistakenly placed a restrictive specification in solicitation does not justify cancellation if award would meet the government's actual needs and there is no showing of prejudice to other bidders.

DECISION

Tapex American Corporation (Tapex), a small business manufacturer of nonmetallic strapping (used to secure packages and to reinforce bundles and containers), protests the partial cancellation after opening of invitation for bids (IFB) No. 2FC-EAX-A4362-S, issued by the General Services Administration (GSA). The IFB is to meet Federal Supply Schedule requirements for steel strapping, seals, and nonmetallic strapping. We sustain the protest.

The IFB covered 18 items of steel strapping, 14 items of seals, and 2 items of nonmetallic strapping (which are the subject of the protest). Each item of nonmetallic strapping was divided into 6 geographic zones, for a total of 12 line items in the solicitation's bid schedule. The IFB set aside 9 of these 12 line items for the exclusive participation of small business concerns.

037845

At bid opening, GSA received bids from four companies, including Tapex, on the line items for nonmetallic strapping. The other bids were from two other small businesses, including Plastic Monofil Co. Ltd. (PMC), and a large business (on the unrestricted items) offering PMC's product. Tapex was the low bidder on five line items, with PMC low on the other seven. Shortly after opening, Tapex advised GSA in writing that PMC manufactured woven non-metallic strapping and could not comply with the IFB requirement for nonwoven strapping. This was confirmed by GSA during a preaward survey of PMC. GSA then referred the matter to the Small Business Administration (SBA) under the certificate of competency (COC) procedures, and because PMC took no action to pursue the COC, the SBA declined to issue one. GSA then found PMC to be nonresponsive.

PMC protested the determination of nonresponsibility to GSA, arguing that the agency had made the IFB's specifications unduly restrictive since the prior procurement for non-metallic strapping did not prohibit a woven product. GSA then conducted an investigation which revealed that a mistake had been made in requiring the strapping to be nonwoven. Consequently, the agency decided that competition had been unduly restricted and canceled the nonmetallic strapping portion of the IFB.

Tapex protests that awards to Tapex and PMC for the items on which each is low bidder would be proper.

As a preliminary matter, GSA argues that Tapex's protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986), because it was filed more than 10 working days after Tapex was orally notified of the mistake in requiring nonwoven strapping and GSA's decision to cancel the solicitation. However, the record shows that Tapex filed a protest with GSA immediately after being orally notified of GSA's decision, and that GSA did not respond to the protest prior to Tapex's filing a protest with our Office. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), we will consider a protest to our Office filed within 10 working days of adverse agency action on a protest initially filed in a timely manner with the contracting agency. Since GSA did not act upon Tapex's protest, we view the company's protest with our Office as timely.

Turning to the merits, GSA states that in the past it has procured nonmetallic strapping under a federal specification that required a nonwoven item. In recent years, however, it has been procuring the strapping under a commercial item description (CID) that does not specify a nonwoven item, and

has found the results acceptable. According to GSA, the investigation it undertook in response to Tapex's complaint about PMC's bid disclosed that the contracting office inadvertently included in the IFB the previously used federal specification. GSA noted that in response to the CID the agency normally receives competitive bids from at least two responsive, responsible firms; GSA discounted the two small businesses other than Tapex as competitors for purposes of the amount of competition received, PMC because the firm was nonresponsive, and the other because its prices were so high. The agency also speculated that use of the federal specification may have been the reason two companies that bid on nonmetallic strapping under the prior solicitation did not bid under this one. GSA concluded the specification for nonmetallic strapping therefore was unduly restrictive and that cancellation of the nonmetallic strapping portion of the IFB was appropriate.

Tapex argues that cancellation is not appropriate because award under the IFB to Tapex for nonwoven metallic strapping would meet the government's needs and would not prejudice any other firms. In this last regard, Tapex asserts that PMC is the only small business manufacturer that makes woven strapping, so that any other small business manufacturer or supplier that failed to bid must have done so for reasons other than the requirement for nonwoven strapping. Tapex further argues that because PMC bid against Tapex notwithstanding the federal specification, there was adequate competition in any case.

Although a contracting agency has broad discretion to cancel an invitation, there must be a compelling reason to do so after bid opening, because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. See Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1985). The fact that a solicitation is defective in some way does not justify cancellation after bid opening if award under the IFB would meet the government's actual needs and there is no showing of prejudice to other bidders. Pacific Coast Utilities Service, Inc., B-220394, Feb. 11, 1986, 86-1 C.P.D. ¶ 150.

We think reinstatement of the IFB and award to Tapex, as well as award to PMC, would be appropriate. It is clear from the record that both woven and nonwoven strapping meet the government's actual needs. Also, we do not believe such awards would prejudice other bidders or other potential bidders. Initially, we do not think it reasonable for GSA, in looking at the impact of its error, to discount PMC's bid in terms of the degree of competition actually generated and

prices received vis a vis the competition and prices there would have been had the CID been used, since the fact is that PMC did bid notwithstanding the federal specification. Moreover, GSA does not dispute Tapex's assertion that PMC is the only small business manufacturer that makes woven strapping. As to GSA's concern with the two companies that bid on the prior procurement, the agency makes no argument that they did not bid on the instant IFB because nonwoven strapping was being required. Indeed, Tapex asserts that one of the companies is a manufacturer of nonwoven strapping like Tapex is, and that the other company is simply a dealer that could obtain strapping from any manufacturing source it chose. Thus, it appears that both of these companies could have bid on the IFB as issued. Finally, GSA did receive a large business bid of PMC's woven product on the unrestricted items, and there is nothing in the record to show that the fourth firm that did bid would have offered different products or lower prices had the requirement for nonwoven strapping not been included. See General Electrodynamics Corp., B-221347.2; B-221347.3, May 13, 1986, 86-1 C.P.D. ¶ 454.

In sum, we think GSA received the same degree of competition under the canceled invitation that it would have received had the CID been used, and awards to Tapex and PMC clearly would meet the government's needs at reasonable prices. In this respect, we recognize that PMC was denied a COC which, in normal circumstances would make the firm ineligible for an award. The record is clear, however, that the only reason GSA found PMC nonresponsible, and referred the matter to the SBA, was that the firm could not supply nonwoven strapping consistent with the federal specification. Because we do not think the specification restriction precludes award to PMC, we also do not think the COC denial based on the restriction should.

In view of our conclusion that award under the nonmetallic strapping portion of the IFB would be proper, Tapex's protest is sustained. The record indicates that GSA has taken no procurement action after canceling the solicitation, although the agency intends to issue another solicitation using the CID. In these circumstances, we see no practical impediment to reinstating the canceled portion of the IFB and awarding contracts to Tapex and PMC on those line items for which each is the low bidder, if they are otherwise found responsive and responsible. Therefore, by separate letter to GSA, we are recommending such reinstatement and awards.

for Milton J. Jordan
Comptroller General
of the United States